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11 **UNITED STATES DISTRICT COURT**
12 **CENTRAL DISTRICT OF CALIFORNIA**

14 JOHN P. SHULAK, individually and
15 as representative of a class of
16 participants and beneficiaries and on
17 behalf of the BMO 401K Savings
18 Plan,

17 Plaintiff,

18 v.

19 BMO FINANCIAL CORP.;
20 BENEFITS ADMINISTRATION
21 COMMITTEE OF BMO
22 FINANCIAL CORP.; and DOES 1-
23 10, inclusive

22 Defendants.

CASE NO.:

**CLASS ACTION COMPLAINT
FOR:**

- (1) **BREACH OF FIDUCIARY
DUTY, 29 U.S.C. §1104(a);**
- (2) **BREACH OF ERISA'S ANTI-
INUREMENT PROVISION, 29
U.S.C. §1103(c)(1);**
- (3) **BREACH OF ERISA'S
PROHIBITED
TRANSACTIONS, 29 U.S.C. §
1106(a)(1) and (b)(1); AND**
- (4) **FAILURE TO MONITOR
FIDUCIARIES.**

[DEMAND FOR TRIAL BY JURY]

1 Plaintiff John P. Shulak, individually and as representative of a class of
2 participants and beneficiaries and on behalf of the BMO 401K Savings Plan
3 (“Plaintiff”), alleges based upon information and belief as follows:

4 **NATURE OF ACTION**

5 1. This action arises out of Defendants BMO Financial Corp., and the
6 Benefits Administration Committee of BMO Financial Corp. (“Defendants”),
7 wrongful use, for their own benefit, of assets in their employees’ 401k retirement
8 plan. As set forth herein, Defendants used forfeited plan assets to reduce its
9 employer contribution obligations, rather than for the benefit of plan participants, in
10 violation of the Employment Retirement Income Security Act (“ERISA”) and
11 Defendants’ fiduciary responsibilities. In this action, Plaintiff seeks damages in
12 connection with Defendants’ wrongful conduct in misusing forfeited Plan assets for
13 its own benefit.

14 **JURISDICTION AND VENUE**

15 2. This action is brought under 29 U.S.C. §§ 1132(a), (e), (f) and (g) as it
16 involves a claim by Plaintiff for employee benefits under an employee benefit plan
17 regulated and governed by ERISA. Subject matter jurisdiction is predicated under
18 these code sections as well as 28 U.S.C. § 1331 as this action involves a federal
19 question.

20 3. The Court has personal jurisdiction over Defendants because ERISA
21 provides for nationwide service of process, and each defendant has minimum
22 contacts with the United States. See 29 U.S.C. § 1132(e)(2).

23 4. The claims of Plaintiff and the putative class arise out of the Plan
24 issued, administered, and/or implemented in this District. Moreover, Plaintiff
25 resides in this District. Thus, venue is proper in this judicial district pursuant to 29
26 U.S.C. §1132(e)(2) (setting forth special venue rules applicable to ERISA actions).

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PARTIES

5. Plaintiff John P. Shulak is an individual who, during the relevant period resided in Los Angeles County, California. Plaintiff was at all relevant times participating in the Plan at issue.

6. The BMO 401(k) Savings Plan, formerly known as the Employees' 401(k) Savings Plan of Bank of Montreal/Harris (hereinafter, "the Plan"), is a defined contribution, individual account, employee pension benefit plan under 29 U.S.C. §1002(2)(A) and § 1002(34) and is subject to the provisions of ERISA pursuant to 29 U.S.C. § 1003(a)

7. Plaintiff is informed and believes, and on that basis alleges, that Defendant BMO Financial Corp., is a financial or banking company, authorized to conduct and is actually conducting business in the State of California

8. Plaintiff is informed and believes, and on that basis alleges, that Defendant the Benefits Administration Committee of BMO Financial Corp. (the "Committee") is a committee that was created by Defendants to assist in the management and administration of the Plan and/or Plan assets. Plaintiff is informed and believes, and on that basis alleges, that the Committee was delegated with the authority to direct the trustee with respect to crediting and distributing Plan assets

9. Defendants each exercised discretionary authority and/or control over the management and/or administration of the Plan, and are fiduciaries of the Plan, including pursuant to 29 U.S.C. §1002(21)(A).

10. Plaintiff is currently ignorant of the true names and capacities, whether individual, corporate, associate, or otherwise, of the defendants sued herein under the fictitious names Does 1 through 10, inclusive, and therefore sue such defendants by such fictitious names. Plaintiff will seek leave to amend this complaint to allege the true names and capacities of said fictitiously named defendants when their true names and capacities have been ascertained. Plaintiff is informed and believes and thereon alleges that each of the fictitiously named defendants is legally responsible

1 in some manner for the events and occurrences alleged herein, and for the damages
2 suffered by the Class.

3 11. Plaintiff is informed and believes and thereon alleges that all
4 defendants, including the fictitious Doe defendants, were at all relevant times acting
5 as actual agents, conspirators, ostensible agents, alter egos, partners and/or joint
6 venturers and/or employees of all other defendants, and that all acts alleged herein
7 occurred within the course and scope of said agency, employment, partnership, and
8 joint venture, conspiracy or enterprise, and with the express and/or implied
9 permission, knowledge, consent authorization and ratification of their co-
10 defendants; however, each of these allegations are deemed “alternative” theories
11 whenever not doing so would result in a contradiction with other allegations.

12 **FACTUAL ALLEGATIONS**

13 12. The assets of the Plan are held in a trust fund pursuant to 29 U.S.C.
14 §1103(a).

15 13. The Plan is funded by a combination of employee/participant
16 contributions (usually paid through wage withholdings) and employer
17 contributions, which are deposited into the Plan’s trust fund. Once deposited into
18 the Plan’s trust fund, all employee/participant and employer contributions become
19 assets of the Plan.

20 14. Participants in the Plan immediately vest in their own contributions,
21 and earnings on their contributions. Plaintiff is informed and believes, and on that
22 basis alleges, that participants vest in the employer contributions after 3 years of
23 service.

24 15. Participants who have a break in service prior to full vesting of
25 employer contributions, forfeit the balance of unvested employer contributions, and
26 Defendants exercise control over how these Plan assets are thereafter allocated.

27 16. Plaintiff is informed and believes, and on that basis alleges, that as part
28 of a wrongful pattern and practice, Defendants have wrongfully and consistently

1 used forfeited nonvested plan assets for its own benefit, to reduce future employer
2 contributions, rather than for the benefit of Plan participants. Defendants' use of
3 Plan forfeited assets to offset its employer contributions violates ERISA statutes,
4 including but not limited to, 29 U.S.C. §§1103(c)(1), 1104(a)(1), and 1106.

5 17. Defendants made the following statement regarding use of forfeited
6 funds in their Form 5500 statements filed for the year 2023: "Forfeitures used to
7 reduce Company contributions were \$1,278,427 for 2023 and \$1,180,804 for
8 2022."

9 18. Defendants' allocation of forfeited fund assets to reduce its own
10 employer contributions benefitted Defendants, but harmed the Plan and participants
11 in the Plan, by reducing Plan assets, not allocating forfeited funds to participants'
12 accounts, and/or by causing participants to incur expenses that could otherwise have
13 been covered in whole or in part by forfeited funds.

14 19. By choosing to use forfeited Plan assets to benefit itself and not the
15 Plan or the Plan's participants, Defendants have placed its own interests above the
16 interests of the Plan and its participants

17 **CLASS ACTION ALLEGATIONS**

18 20. Plaintiff bring this action on behalf of himself and all others similarly
19 situated as a Class Action pursuant to Federal Rules of Civil Procedure Rule 23.
20 Pursuant to Rule 23(b)(1) and (b)(2), Plaintiff seeks certification of a class defined
21 as follows:

22 All participants and beneficiaries of BMO 401K Savings Plan, who
23 participated in the plan at anytime within the longest statute of
24 limitations for each claim pled, excluding Defendants and members of
25 the Committees.

26 21. Plaintiff and the Class reserve the right under Federal Rule of Civil
27 Procedure Rule 23(c)(1)(C) to amend or modify the class to include greater
28 specificity, by further division into subclasses, or by limitation to particular issues.

1 22. This action has been brought and may be properly maintained as a
2 class action under the provisions of Federal Rules of Civil Procedure Rule 23
3 because there is a well-defined community of interest in the litigation and the
4 proposed class is easily ascertainable.

5 **A. Numerosity**

6 23. The potential members of the proposed class as defined are so
7 numerous that joinder of all the members of the proposed class is impracticable.
8 While the precise number of proposed class members has not been determined at
9 this time, Plaintiff is informed and believes that there are a substantial number of
10 participants and beneficiaries Plan who have been similarly affected.

11 **B. Commonality**

12 24. Common questions of law and fact exist as to all members of the
13 proposed class.

14 **C. Typicality**

15 25. The claims of the named Plaintiff is typical of the claims of the
16 proposed class. Plaintiff and all members of the class are similarly affected by
17 Defendants' wrongful conduct.

18 **D. Adequacy of representation**

19 26. Plaintiff will fairly and adequately represent and protect the interests of
20 the members of the proposed class. Counsel who represent Plaintiff are competent
21 and experienced in litigating large and complex class actions.

22 **E. Superiority of class action**

23 27. A class action is superior to all other available means for the fair and
24 efficient adjudication of this controversy. Individual joinder of all members of the
25 proposed Class is not practicable, and common questions of law and fact exist as to
26 all class members.

27 28. Class action treatment will allow those similarly situated persons to
28 litigate their claims in the manner that is most efficient and economical for the

1 parties and the judicial system. Plaintiff is unaware of any difficulties that are likely
2 to be encountered in the management of this action that would preclude its
3 maintenance as a class action.

4 **F. Rule 23(b) requirements**

5 29. Inconsistent or varying adjudications with respect to individual
6 members of the class would establish incompatible standards of conduct.

7 30. Adjudications with respect to individual class members would be
8 dispositive of the interests of the other members not parties to the individual
9 adjudications or would substantially impair or impede their ability to protect their
10 interests.

11 31. Defendants have acted or refused to act on grounds generally
12 applicable to the class, thereby making appropriate final injunctive relief or
13 corresponding declaratory relief with respect to the class as a whole.

14 **FIRST CLAIM FOR RELIEF**

15 **BREACH OF FIDUCIARY DUTY**

16 **29 U.S.C. § 1104(a)**

17 32. Plaintiff re-alleges and incorporates by reference the allegations
18 contained in the preceding paragraphs of this complaint, as though fully set forth
19 herein.

20 33. Under 29 U.S.C. § 1104(a)(1)(A), Defendants were required to
21 discharge their duties owed to the Plan “solely in the interest of the participants and
22 beneficiaries and . . . for the exclusive purpose of: (i) providing benefits to
23 participants and their beneficiaries, and (ii) defraying reasonable expenses of
24 administering the plan.” Defendants breached their fiduciary duty under 29 U.S.C.
25 § 1104(a)(1)(A) by utilizing forfeited Plan assets for its benefit, rather than the
26 benefit of Plan participants. Defendants have chosen to apply forfeited Plan assets
27 to decrease future employer contributions, instead of using those funds for the
28

1 benefit of Plan participants. In doing so, Defendants placed their interests above
2 the interests of Plan participants and beneficiaries.

3 34. Pursuant to 29 U.S.C. § 1104(a)(1)(B), Defendants were required to
4 discharge their duties with respect to the Plan “with the care, skill, prudence, and
5 diligence under the circumstances then prevailing that a prudent man acting in a
6 like capacity and familiar with such matters would use in the conduct of an
7 enterprise of a like character and with like aims.” Defendants breached their duty
8 of prudence under 29 U.S.C. § 1104(a)(1)(B) by declining to use the forfeited funds
9 in the plan for the benefit of Plan participants, and instead using such Plan assets to
10 reduce the Company’s own contributions to the Plan. Defendants failed to engage
11 in a reasoned and impartial decision making process in deciding to use the forfeited
12 funds in the Plan to reduce the Company’s own contribution expenses. Defendants
13 failed to act in a prudent manner, in the best interest of the Plan’s participants, and
14 failed to consider whether participants would be better served by another use of
15 these Plan assets after considering all relevant factors.

16 35. Pursuant to 29 U.S.C. § 1104(a)(1)(D), Defendants were required to
17 discharge duties solely in the interest of Plan participants, and “in accordance with
18 the documents and instruments governing the plan insofar as such documents and
19 instruments are consistent with the provisions of” ERISA. Defendants breached
20 their fiduciary duty under Section 1104(a)(1)(D) by using forfeited Plan assets to
21 offset future employer contributions, including but not limited to, by violating
22 including the anti-inurement and prohibited transaction statutes, as alleged herein.

23 36. Defendants’ wrongful conduct, as alleged herein, caused the Plan to
24 receive fewer future employer contributions than it would otherwise receive, and
25 depleted Plan assets.

26 37. As a direct and proximate cause of Defendants’ fiduciary breaches, the
27 Plan suffered injury and losses and, pursuant to 29 U.S.C. § 1109, Defendants are
28 liable for such losses.

1 38. Each Defendant knowingly participated in the breach of the other
2 Defendants, knowing that such acts were a breach, enabled other Defendants to
3 commit a breach by failing to lawfully discharge its own fiduciary duties, knew of
4 the breach by the other Defendants and failed to make any reasonable effort under
5 the circumstances to remedy the breach. Thus, each Defendant is liable for the
6 losses under 29 U.S.C. § 1105(a).

7 **SECOND CLAIM FOR RELIEF**

8 **BREACH OF ERISA’S ANTI-INUREMENT PROVISION**

9 **29 U.S.C. §1103(c)(1)**

10 39. Plaintiff re-alleges and incorporates by reference the allegations
11 contained in the preceding paragraphs of this complaint, as though fully set forth
12 herein.

13 40. Pursuant to 29 U.S.C. § 1103(c)(1), “the assets of a plan shall never
14 inure to the benefit of any employer and shall be held for the exclusive purpose of
15 providing benefits to participants in the plan and their beneficiaries and defraying
16 reasonable expenses of administering the plan.”

17 41. The funds in a participant’s accounts that are forfeited when a break in
18 service occurs prior to full vesting are assets of the Plan.

19 42. By using Plan assets for its own benefit, to reduce its own future
20 employer contributions to the Plan, thereby saving itself millions of dollars in
21 contribution costs, Defendants caused the assets of the Plan to inure to the benefit
22 of the employer in violation of 29 U.S.C. § 1103(c)(1).

23 43. Pursuant to 29 U.S.C. § 1109(a), Defendants are liable for the Plan
24 losses resulting from violation of ERISA’s anti inurement provision as alleged in
25 this claim, and must restore to the Plan all profits secured through their use of Plan
26 assets, and is subject to other equitable or remedial relief as appropriate.

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THIRD CLAIM FOR RELIEF

BREACH OF ERISA’S PROHIBITED TRANSACTIONS

29 U.S.C. § 1106

44. Plaintiff re-alleges and incorporates herein by reference the allegations contained in the preceding paragraphs of this complaint, as though fully set forth herein.

45. 29 U.S.C. § 1106(a)(1) provides that “[a] fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect . . . exchange . . . of any property between the plan and a party in interest . . . or use by or for the benefit of a party in interest, of any assets of the plan.” Defendants are parties in interest, as that term is defined under 29 U.S.C. §1002 (14), because they are Plan fiduciaries and/or employer of Plan participants.

46. 29 U.S.C. § 1106(b) provides that “[a] fiduciary with respect to a plan shall not,” among other things, “deal with the assets of the plan in his own interest or for his own account.”

47. Defendants violated these prohibitions by utilizing these Plan assets as a substitute for future employer contributions to the Plan, thereby saving themselves millions of dollars in contribution expenses. As alleged herein, Defendants caused the Plan to engage in transactions that constituted a direct or indirect exchange of existing Plan assets for future employer contributions and/or a use of Plan assets by or for the benefit of a party in interest, and Defendants dealt with the assets of the Plan in their own interest and for their own account.

48. As a result of these prohibited transactions, Defendants caused the Plan to suffer losses in the amount of the Plan assets that were substituted for future employer contributions and the lost investment returns on those assets.

49. Pursuant to 29 U.S.C. § 1109(a), Defendants are liable for the Plan losses resulting from violation of ERISA’s prohibition on these transactions, as

1 alleged in this claim, and must restore to the Plan all profits secured through their
2 use of Plan assets, and is subject to other equitable or remedial relief as appropriate.

3 **FOURTH CLAIM FOR RELIEF**

4 **FAILURE TO MONITOR FIDUCIARIES**

5 50. Plaintiff re-alleges and incorporates herein by reference the allegations
6 contained in the preceding paragraphs of this complaint, as though fully set forth
7 herein.

8 51. Defendant BMO Financial Corp. oversaw the overall governance of
9 the Plan and had authority to delegate fiduciary responsibilities. Plaintiff is
10 informed and believe, and on that basis allege, that Defendant BMO Financial
11 Corp. created the Committee to assist in Plan management and administration, and
12 delegated to the Committee the authority to direct crediting and distribution of Plan
13 assets.

14 52. Defendants had a duty to monitor the person(s) to whom it delegated
15 fiduciary responsibilities, and to take prompt action to protect the plan and correct
16 any breaches of fiduciary duty or violation of ERISA statutes.

17 53. Defendant BMO Financial Corp. breached their duty to monitor the
18 fiduciaries to whom they delegated responsibility for Plan management and
19 administration by, among other things, unreasonably failing to monitor the
20 Committees' management and use of forfeited funds, failing to take steps to ensure
21 that its fiduciary duties and ERISA statutes were properly complied with respect to
22 Plan assets, and permitting Defendants to continuously use forfeited funds for the
23 benefit of the employer, rather than Plan participants, as alleged herein

24 54. As a direct and proximate cause of Defendants' breach of their duty to
25 monitor fiduciaries, the Plan suffered losses, as alleged herein.

26 **REQUEST FOR RELIEF**

27 Wherefore, Plaintiff, on behalf of the Plan and all similarly situated Plan
28 participants and beneficiaries, prays for judgment against Defendants as follows:

1 1. That Defendants have breached their fiduciary duties and engaged in
2 prohibited conduct and transactions as described above;

3 2. That Defendants are personally liable to make good to the Plan all
4 losses to the Plan resulting from each violation of ERISA described above, and to
5 otherwise restore the Plan to the position it would have occupied but for these
6 violations;

7 3. That all assets and profits secured by Defendants as a result of each
8 violation of ERISA described above are to disgorged;

9 4. For an accounting to determine the amounts Defendants must make
10 good to the Plan under 29 U.S.C. § 1109(a);

11 5. Removal of the fiduciaries who have breached their fiduciary duties
12 and enjoin them from future ERISA violations;

13 6. Surcharge against Defendants and in favor of the Plan all amounts
14 involved in any transactions which such accounting reveals were improper,
15 excessive and/or in violation of ERISA;

16 7. Certify the case as a class action;

17 8. Award attorneys' fees and costs under 29 U.S.C. § 1132(g)(1) and the
18 common fund doctrine;

19 9. Award class representatives a service award.

20 10. Order the payment of interest to the extent it is allowed by law; and

21 11. Grant other equitable or remedial relief as the Court deems
22 appropriate.

23 DATED: November 6, 2024

HAFFNER LAW PC

24
25 By: /s/ Joshua H. Haffner
26 Joshua H. Haffner
27 Alfredo Torrijos
28 Vahan Mikayelyan
Attorneys for Plaintiff and all
Others similarly situated

DEMAND FOR JURY TRIAL

Plaintiff hereby demands a trial by jury on all claims so triable.

DATED: November 6, 2024

HAFFNER LAW PC

By: /s/ Joshua H. Haffner
Joshua H. Haffner
Alfredo Torrijos
Vahan Mikayelyan
Attorneys for Plaintiff